

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SURFSAND RESORT, LLC, an  
Oregon limited liability  
company,

3:17-cv-00866-BR

OPINION AND ORDER

Plaintiff,

v.

NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY, an Ohio  
company, and HARLEYSVILLE  
INSURANCE COMPANY, a  
Pennsylvania company,

Defendants.

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Attorneys for Defendants

**BROWN, Senior Judge.**

This matter comes before the Court on Plaintiff's Motion (#32) for Summary Judgment and Defendants' Cross-Motion (#36) for Summary Judgment. The Court concludes the record is sufficiently developed such that oral argument would not be helpful to resolve these Motions. For the reasons that follow, the Court **DENIES** Plaintiff's Motion, **GRANTS** Defendants' Motion, and **DISMISSES** this matter.

#### **BACKGROUND**

The following facts are taken from Plaintiffs' Complaint and the parties' filings related to their Motions for Summary Judgment.

On September 14, 2015, Defendants Nationwide Mutual Fire Insurance Company and Harleysville Insurance Company issued to Plaintiff Surfsand Resort, LLC, a Standard Flood Insurance Policy (SFIP) pursuant to the National Flood Insurance Act (NFIA), 42 U.S.C. § 4001(a). The policy period was from September 14, 2015,

through September 14, 2016. The policy "insure[d] [Plaintiff] against direct physical loss by or from flood." Joint Statement of Agreed Facts at ¶ 5. The policy, however, imposed "restricted coverage on building items located in a 'basement,' which it define[d] as '[a]ny area of the building, including any sunken room or sunken portion of a room, having its floor below ground level (subgrade) on all sides.'" Joint Statement of Agreed Facts at ¶ 6 (quoting Ex. 1, Art. II(B)(5)).

The policy also provided "[w]ithin 60 days after the loss, send us a proof of loss, which is your statement of the amount you are claiming under the policy signed and sworn to by you.'" Joint Statement of Agreed Facts at ¶ 8 (quoting Ex. 1, Art. VII(J)(4)) (emphasis in original). Finally, the policy provided:

"If we reject your proof of loss in whole or in part you may: (a) Accept such denial of your claim; (b) Exercise your rights under this policy; or (c) File an amended proof of loss as long as it is filed within 60 days of the date of the loss."

Joint Statement of Agreed Facts at ¶ 9 (quoting Ex. 1, Art. VII(M)(2)).

On December 11, 2015, the tidal waters of the Pacific Ocean overflowed and damaged the bottom level of hotel rooms at the Surfsand Resort in Cannon Beach, Oregon, which Plaintiff owned.

On December 22, 2015, Nationwide received its first notice of loss from Plaintiff.

"The claim was assigned to Colonial Claims Corporation who

assigned Jacob Valencia to serve as the independent adjuster."

Joint Statement of Agreed Facts at ¶ 13. Valencia advised

Plaintiff:

I am the eyes and ears of the insurance company.  
I cannot bind them. I cannot tell you what amount  
of money you will be paid. My job is to make  
assessment for the insurance company of the damage  
under the policy coverage based on my knowledge  
and experience. My assessment will be subject to  
the insurance company's approval.

\* \* \*

Your insurance policy is a written contract with  
stated terms and conditions. Please comply with  
them and specifically we want to note you should  
file a Proof of Loss within sixty days from the  
date of your event. Please see VII. General  
Conditions, p12 of 19 for details on the proof of  
loss.

Joint Statement of Agreed Facts at ¶¶ 13-14.

On May 4, 2016, Plaintiff executed a signed and sworn Proof  
of Loss in the amount of \$98,765.08. Joint Statement of Agreed  
Facts at ¶ 17.

At some point before June 2, 2016, Plaintiff requested the  
Federal Emergency Management Agency (FEMA) to grant Plaintiff a  
waiver of the 60-day Proof of Loss deadline contained in the SFIP  
with respect to Plaintiff's Proof of Loss in the amount of  
\$98,765.08.

On June 2, 2016, FEMA granted Plaintiff a limited waiver of  
the 60-day Proof of Loss deadline as follows:

Based on the information you submitted, your  
request for a waiver of the 60 day Proof of Loss

policy provision is approved. This limited waiver is for *only the amount of the loss and scope of the damages outlined in this request* and otherwise does not waive the proof of loss or any other requirement of the [SFIP] and makes no other comment because of lack of information.

Decl. of Brian C. Hickman, Ex. 4 at 2 (emphasis added).

On June 3, 2016, Nationwide sent Plaintiff a coverage-determination letter enclosing a check for \$98,765.08 and advising Plaintiff that it was denying coverage for

damages to the insured contents and all non-covered items located in the basement pursuant to the SFIP and quoted the relevant policy language. The letter also explained the appeal process and provisions related to filing suit against Nationwide.

Joint Statement of Agreed Facts at ¶ 19.<sup>1</sup>

On July 14, 2016, Plaintiff appealed Nationwide's denial of coverage for damage to the "non-covered items located in the basement" to FEMA. Specifically, Plaintiff disputed Nationwide's determination that Plaintiff's property had a basement within the meaning of the SFIP.

On October 19, 2016, FEMA advised Plaintiff that an inspection by John Garner, an Oregon licensed engineer, was "necessary because the elevations of the lowest floor and adjacent grades of your building are unclear." Hickman Decl., Ex. 7 at 1.

On December 29, 2016, Gardner issued his Engineering Report

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<sup>1</sup> The June 3, 2016, letter is not in the record.

in which he concluded:

It is my opinion that a reasonable interpretation of ground level should involve a natural drainage runoff. Simply considered, if a portion of a building would accumulate water in rains unless water is pumped or drained away, it is reasonably below ground level. Thus, if all areas of the floor are below ground level on all sides, the floor would hold water unless it were physically drained through plumbing or storm drains. Conversely, if an area of the floor is above ground level, then it would not hold water and water would drain away naturally.

\* \* \*

In this particular case, the lower floor units are blocked from any natural drainage by the grassy area between them and the beach. The only way runoff can drain away is via French drains on the patios. The lower level below ground level on all sides, and the nearest lower ground is more than 25 feet away, outside the sea wall. The grassy area and sea wall block any natural positive drainage away from the interior, thus it is reasonable to conclude that the interior units are below ground level on all sides.

Based upon a review of the available data, it is my opinion that the lower floor of the Surfsand Resort Beachfront Building is below ground level on all sides and thus does [in] fact meet the definition of a basement as denied in the Standard Flood Insurance Policy. This floor should be considered a basement for policy purposes, including Units 1101-1112, the hallway, and the storage area.

Decl. of James Guse, Ex. 7 at 6-7.

On March 23, 2017, Nationwide advised Plaintiff that it had reviewed Gardner's Report and that it was "upholding our denial of non-covered items in a basement as indicated in our letter of June 3, 2016." Guse Decl., Ex. 8 at 1.

On June 2, 2017, Plaintiff filed an action in this Court against Nationwide and Harleysville asserting claims for breach of insurance contract and negligence *per se*. Plaintiff seeks damages in the amount of \$396,234.92, "which represents the amount of the covered loss denied by Defendants"; seeks attorneys' fees; and requests a jury trial.

On August 21, 2017, Defendants filed a Motion to Dismiss Count II of Plaintiff's Complaint and a Motion to Strike Jury Demand in which they sought an order dismissing Plaintiff's claim for negligence *per se*, request for attorneys' fees, and demand for a jury trial.

On October 16, 2017, the Court issued an Opinion and Order in which it granted Defendants' Motion to Dismiss and Motion to Strike Jury Demand.

On March 15, 2018, Plaintiff filed a Motion for Summary Judgment. On April 5, 2018, Defendants filed a Cross-Motion for Summary Judgment. The Court took the Motions under advisement on May 3, 2018.

#### **STANDARDS**

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Washington Mut. Ins. v. United States*, 636 F.3d 1207, 1216 (9<sup>th</sup> Cir. 2011). See also Fed. R.

Civ. P. 56(a). The moving party must show the absence of a genuine dispute as to a material fact. *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9<sup>th</sup> Cir. 2012). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and point to "specific facts demonstrating the existence of genuine issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9<sup>th</sup> Cir. 2010) "This burden is not a light one. . . . The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." *Id.* (citation omitted).

A dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9<sup>th</sup> Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9<sup>th</sup> Cir. 2010). "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9<sup>th</sup> Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9<sup>th</sup> Cir. 1982)).

"A non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary

judgment." *F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9<sup>th</sup> Cir. 2009)(citation omitted). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9<sup>th</sup> Cir. 2009) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9<sup>th</sup> Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9<sup>th</sup> Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

### **DISCUSSION**

Plaintiff moves for summary judgment on the ground that there is not any genuine dispute of material fact that the lowest level of the Surfsand Resort is not a basement within the meaning of the SFIP. According to Plaintiff, it is, therefore, entitled to coverage for damages in the amount of \$396,234.92, "which represents the amount of the covered loss denied by Defendants."

Defendants, on the other hand, move for summary judgment on the ground that it paid Plaintiff \$98,765.08, which is the amount of the only Proof of Loss that Plaintiff submitted to Defendants. Moreover, Plaintiff has never submitted a supplemental Proof of

Loss for the \$396,234.92 that it now seeks in this action, and, therefore, Plaintiff has not satisfied a condition precedent of the SFIP. Defendants also contend the lowest level of the Surfsand Resort is a basement within the meaning of the policy, and, therefore, Plaintiff's requested damages are not covered under the policy.

### **I. National Flood Insurance Program**

Congress enacted the NFIA in 1968 in response to the fact that flood disasters were creating personal hardships and economic distress that was "increasing [the] burden on the Nation's resources" and the exposure to flood losses was "growing." 42 U.S.C. § 4001(a). The NFIA created the National Flood Insurance Program (NFIP) under the administration of FEMA to "mak[e] flood insurance coverage available on reasonable terms and conditions." *Id.* See also 42 U.S.C. § 4011. Flood insurance under the NFIP is sold to qualified applicants either directly by FEMA or by private insurance companies known as "write-your-own" (WYO) Companies. 44 C.F.R. § 62.23. A WYO Company enters into a standardized agreement with FEMA that authorizes the WYO Company to issue flood insurance in its own name and assigns the WYO Company the responsibility for "the adjustment, settlement, payment and defense of all claims arising from policies of flood insurance it issues under the Program." 44 C.F.R. § 62.23(d). Nevertheless, the ultimate responsibility

for paying all claims remains with FEMA. See 42 U.S.C. § 4017(a).

The NFIA regulations specify the required terms and conditions of policies written under the NFIP. For example, the SFIP must advise the insured that FEMA is providing insurance "under the terms of the National Flood Insurance Act of 1968 and its Amendments, and Title 44 of the Code of Federal Regulations." 44 C.F.R. pt. 61, app. A(1), art. I. The SFIP also must identify the scope of coverage, the exclusions, the deductions, and the general conditions applicable to coverage, adjustment, and payment. The SFIP must also include the following provision:

This policy and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. § 4001, et seq.), and Federal common law.<sup>2</sup>

44 C.F.R. pt. 61, app. A(1), art. IX. WYO Companies cannot waive or vary the terms or conditions of the SFIP without the express, written consent of the Federal Insurance Administrator. 44 C.F.R. § 61.13(d).

In addition, the SFIP also must include the following conditions and limitations for filing actions for claims under SFIPs and for disputes arising out of the handling of any claim under an SFIP:

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<sup>2</sup> The SFIP at issue included all of the required language identified above.

You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. . . . This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under the policy.

44 C.F.R. pt. 61, app. A(1), art. VII(R). See also 42 U.S.C. § 4072; 44 C.F.R. § 62.22.

"In short, [SFIP], claims under [SFIPs], and disputes relating to the handling of claims under [SFIPs] are highly regulated." *Woodson v. Allstate Ins. Co.*, 855 F.3d 628, 622-23 (4<sup>th</sup> Cir. 2017). See also *Suopys v. Omaha Prop. & Cas.*, 404 F.3d 805, 809 (3d Cir. 2005) ("Because any claim paid by a WYO Company is a direct charge to the United States Treasury, strict adherence to the conditions precedent to payment is required.") (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947); *Flick v. Liberty Mut.*, 205 F.3d 386 (9<sup>th</sup> Cir. 2000) (strict compliance is applied to policies written by WYO Companies under the NFIP because flood-loss claims are paid from United States Treasury)).

## **II. Plaintiff failed to satisfy a condition precedent of the SFIP.**

As noted, Defendants move for summary judgment on the ground that Plaintiff has never submitted a supplemental Proof of Loss for the \$396,234.92 that it now seeks in this action. According to Defendants, therefore, Plaintiff has not satisfied a condition precedent of the SFIP, and, accordingly, Plaintiff may not bring

a claim for those damages.

It is undisputed that Plaintiff submitted to Defendants a Proof of Loss on May 4, 2016, asserting a claim for \$98,765.08. As noted, however, the record does not reflect Plaintiff submitted any supplemental or additional Proof of Loss to Defendants for the \$396,234.92 that it now seeks as damages.

The SFIP provides in relevant part:

In case of a flood loss to insured property, you must:

\* \* \*

3. Prepare an inventory of damage property showing the quantity, description, actual cash value, and amount of loss. Attach all bills, receipts, and related documents.
4. Within 60 days after the loss, send us a proof of loss, which is your statement of the amount you are claiming under the policy signed and sworn to by you, and which furnishes us with the following information:

\* \* \*

- f. Specifications of damaged buildings and detailed repair estimates; [and]

\* \* \*

- i. The inventory of damaged property described in J.3 above.

Hickman Decl., Ex. 1 at Art VII(J)(4)(emphasis added). See also 44 C.F.R. § 61, App. A(2), Art. VII(J)(4)(same). The SFIP provides if the insurer rejects the Proof of Loss "in whole or in part," the insured "may":

- a. Accept such denial of your claim;
- b. Exercise your rights under this policy; or
- c. File an amended proof of loss, as long as it is filed within 60 days of the date of the loss.

Hickman Decl., Ex. 1 at Art VII(M)(2).

The Ninth Circuit and other courts have held a timely signed and sworn Proof of Loss is a condition precedent to an insured obtaining benefits under an SFIP policy. See *Pecarovich v. Allstate Ins. Co.*, 309 F.3d 652, 659-60 (9<sup>th</sup> Cir. 2002) (concluding the plaintiff failed to satisfy the condition precedent of the SFIP when he did not file a proof of loss). See also *Dickson v. Am. Bankers Ins. Co. of Fl.*, 739 F.3d 397, 399 (8<sup>th</sup> Cir. 2014)("[T]he proof of loss requirement is a regulatory limit on the disbursement of funds through a federal insurance program; as such 'it is to be strictly construed [for it] serves as a condition precedent to recovery under the SFIP.'" (quoting *Gunter v. Farmers Ins. Co.*, 736 F.3d 768, 773 (8<sup>th</sup> Cir. 2013))); *DeCosta v. Allstate Ins. Co.*, 730 F.3d 76, 84 (1<sup>st</sup> Cir. 2013) ("Given that it is the government's liability at stake in any suit against a WYO insurer, compliance with the proof-of-loss provision serves as a "condition[ ] precedent to a waiver by the federal government of its sovereign immunity.").

Although the Ninth Circuit has not addressed the issue, other courts have held an insured must submit an additional or

supplemental proof of loss as a condition precedent "to recover an additional amount on a preexisting claim under a[n] SFIP." *Cummings v. Fidelity Nat. Indem. Ins. Co.*, 636 F. App'x 221, 223-24 (5<sup>th</sup> Cir. 2016). See also *Dickson*, 739 F.3d at 399 ("a signed and sworn proof of loss claims only the amounts listed in those forms, and the insured must timely file an additional proof of loss to claim any additional amount of money."). As the Fifth Circuit explained in *Cummings*,

a policy of "insurance issued pursuant to a federal program must be strictly construed and enforced.'" *Monistere*, 559 F.3d at 394 (quoting *Gowland*, 143 F.3d at 954). "Because insurance companies act as 'fiscal agents' of the government under the National Flood Insurance Program, all policy awards deplete federally allocated funds." *Id.* (quoting *In re Estate of Lee*, 812 F.2d 253, 256 (5<sup>th</sup> Cir. 1987)). Accordingly, "not even the temptations of a hard case' will provide a basis for ordering recovery contrary to the terms of a regulation, for to do so would disregard 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" *Id.* (quoting *Forman v. Fed. Emergency Mgmt. Agency*, 138 F.3d 543, 545 (5<sup>th</sup> Cir. 1998)). See generally *Richmond Printing LLC v. Dir. Fed. Emergency Mgmt. Agency*, 72 F. App'x 92, 97 (5<sup>th</sup> Cir. 2003) (citing *Kerr v. FEMA*, 113 F.3d 884 (8<sup>th</sup> Cir. 1997)) (finding that completion of the proof of loss is the insured's own responsibility and "any reliance on statements made by the adjuster that contradicted the terms of the SFIP was unreasonable as a matter of law; the insured had a duty to read the policy and acted unreasonably in relying on adjusters provided only as a 'courtesy'"); see also *Gowland*, 143 F.3d at 955 (quoting *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947)) ("Requiring [insured parties] to turn square corners when dealing with the Treasury 'does not reflect a callous outlook. It merely expresses the duty of all courts to observe the

conditions defined by Congress for charging the public treasury.'").

636 F. App'x at 224.

Plaintiff does not dispute it failed to file a supplemental or additional proof of loss seeking the additional damages of \$396,234.92 that it now seeks. Plaintiff, however, asserts it provided all "of the documentation regarding damaged areas . . . and its contents" to claims adjuster Jacob Valencia who "specifically excluded items that he considered to be in a basement." Decl. of Ted Stark at ¶ 4. Plaintiff points out that Valencia advised Plaintiff in February and April 2016 (before Plaintiff filed the May 2016 proof of loss) that "a Proof of Loss was only to act as a 'minimum' of items that are flood damaged. He further indicated that any 'covered, omitted or reasonable cost difference' could be addressed with a Claim for Additional Payment (CAP)." *Id.* Plaintiff argues Valencia was acting as Defendants' agent, and, therefore, Valencia's refusal to submit all of the damages either waived the requirement or absolved Plaintiff of the responsibility to submit a supplemental proof of loss as to the damages that Plaintiff now seeks. Arguments similar to those made by Plaintiff, however, have been rejected by various courts.

For example, the Eighth Circuit explained in *Dickson*:

The SFIP defines the proof of loss as the insureds' signed and sworn "statement of the amount [they] are claiming under the policy."

44 C.F.R. pt. 61 app. A(1), art. VII(J)(4). Independent insurance adjusters may assist the insureds by providing or preparing this proof of loss form, but the SFIP is clear that even with such assistance the insureds must use their own judgment concerning the amount of loss they claim.

\* \* \*

Among the significant SFIP provisions concerning the proof of loss requirement is a rule that "[i]n completing the proof of loss, [the insureds] must use [their] own judgment concerning the amount of loss and justify that amount." 44 C.F.R. pt. 61 app. A(1), art. VII(J)(5). While insurance adjusters may assist with preparing the proof of loss form, they do so as "a matter of courtesy only" and insureds are ultimately responsible for ensuring their claim is timely filed. *Id.*, art. VII(J)(7). Thus as a matter of law, the [plaintiffs] were the only parties responsible for ensuring compliance with the proof of loss requirement, including the determination of the "amount of loss."

\* \* \*

[T]he SFIP requires insureds to use their own judgment to determine the amount of loss they claim. It was therefore solely the [plaintiffs'] own responsibility to file a timely proof of loss for any amount they believed was covered by the policy.

*Dickson*, 739 F.3d at 399-400. Similarly, in *DaCosta* the court noted

FEMA must provide express written consent . . . to waive any of the requirements outlined in [an] SFIP. The SFIP's waiver provision states, "[t]his policy cannot be changed nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator. No action we take under the terms of this policy constitutes a waiver of any of our rights." 44 C.F.R. pt. 61, App. a(1), Art. VII(D).

The SFIP's stringent waiver provision reflects the fact that private insurers are "fiscal agents of the United States," 42 U.S.C. § 4071(a)(1), as opposed to general agents. See *McGair*, 693 F.3d at 96. Thus, consistent with their duty to strictly enforce the SFIP, private insurance companies can "[vary] the terms of a policy only with FEMA's express written consent." *Jacobson*, 672 F.3d at 175. . . . [T]he SFIP "explicitly preclude[s] oral waiver or waiver by conduct.

730 F.3d at 87.

In *Dickson* the court also rejected the plaintiffs' assertion that their claims adjuster engaged in misconduct when it inaccurately advised them about the amount of their proof of loss:

The adjuster explained . . . the [plaintiffs] could "always submit a supplemental claim for additional damages." The [plaintiffs] were thus alerted to the potential need for filing a supplemental claim. . . . Moreover, the SFIP provides clear directives that the [plaintiffs] needed to file a proof of loss for their claim . . . . The responsibility to ensure compliance with the prerequisites for filing suit lay with the [plaintiffs].

*Id.* at 401.

This Court adopts the reasoning of *Cummings*, *DaCosta*, and *Dickson* and concludes Plaintiff's submission of an additional or supplemental proof of loss is a condition precedent to recover an additional amount on a preexisting claim under an SFIP. The Court also concludes Valencia's alleged refusal to submit a claim for damages related to the part of Plaintiff's property that he believed to be a basement is insufficient to waive the

supplemental proof-of-loss requirement because Plaintiff had an independent duty to determine the amount of its own loss; FEMA did not waive the SFIP requirement to submit a supplemental proof of loss; and Valencia, in fact, informed Plaintiff that "any covered, omitted or reasonable cost difference could be addressed with a Claim for Additional Payment." Thus, on this record the Court concludes Plaintiff failed to comply with the condition precedent for seeking additional damages within the time required by the SFIP and FEMA. The Court, therefore, grants that portion of Defendants' Motion for Summary Judgment based on Plaintiff's failure to file a supplemental proof of loss.

In addition, because the Court has concluded Plaintiff failed to satisfy a condition precedent before bringing this action, the Court does not have the authority to decide whether the lower level of Plaintiff's property is a basement within the meaning of the SFIP, and, therefore, the Court does not express any opinion on that issue. Accordingly, the Court denies Plaintiff's Motion for Summary Judgment.

#### **CONCLUSION**

For these reasons, the Court **DENIES** Plaintiff's Motion (#32) for Summary Judgment, **GRANTS** Defendants' Cross-Motion (#36) for

Summary Judgment, and **DISMISSES** this matter.

IT IS SO ORDERED.

DATED this 28<sup>th</sup> day of June, 2018.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States Senior District Judge

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#### **BACKGROUND**

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On December 11, 2015, the tidal waters of the Pacific Ocean overflowed and damaged the bottom level of hotel rooms at the Surfsand Resort in Cannon Beach, Oregon, which Plaintiff owned.

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"The claim was assigned to Colonial Claims Corporation who

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Plaintiff:

I am the eyes and ears of the insurance company.  
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of money you will be paid. My job is to make  
assessment for the insurance company of the damage  
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the insurance company's approval.

\* \* \*

Your insurance policy is a written contract with  
stated terms and conditions. Please comply with  
them and specifically we want to note you should  
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Based on the information you submitted, your  
request for a waiver of the 60 day Proof of Loss

policy provision is approved. This limited waiver is for *only the amount of the loss and scope of the damages outlined in this request* and otherwise does not waive the proof of loss or any other requirement of the [SFIP] and makes no other comment because of lack of information.

Decl. of Brian C. Hickman, Ex. 4 at 2 (emphasis added).

On June 3, 2016, Nationwide sent Plaintiff a coverage-determination letter enclosing a check for \$98,765.08 and advising Plaintiff that it was denying coverage for

damages to the insured contents and all non-covered items located in the basement pursuant to the SFIP and quoted the relevant policy language. The letter also explained the appeal process and provisions related to filing suit against Nationwide.

Joint Statement of Agreed Facts at ¶ 19.<sup>1</sup>

On July 14, 2016, Plaintiff appealed Nationwide's denial of coverage for damage to the "non-covered items located in the basement" to FEMA. Specifically, Plaintiff disputed Nationwide's determination that Plaintiff's property had a basement within the meaning of the SFIP.

On October 19, 2016, FEMA advised Plaintiff that an inspection by John Garner, an Oregon licensed engineer, was "necessary because the elevations of the lowest floor and adjacent grades of your building are unclear." Hickman Decl., Ex. 7 at 1.

On December 29, 2016, Gardner issued his Engineering Report

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<sup>1</sup> The June 3, 2016, letter is not in the record.

in which he concluded:

It is my opinion that a reasonable interpretation of ground level should involve a natural drainage runoff. Simply considered, if a portion of a building would accumulate water in rains unless water is pumped or drained away, it is reasonably below ground level. Thus, if all areas of the floor are below ground level on all sides, the floor would hold water unless it were physically drained through plumbing or storm drains. Conversely, if an area of the floor is above ground level, then it would not hold water and water would drain away naturally.

\* \* \*

In this particular case, the lower floor units are blocked from any natural drainage by the grassy area between them and the beach. The only way runoff can drain away is via French drains on the patios. The lower level below ground level on all sides, and the nearest lower ground is more than 25 feet away, outside the sea wall. The grassy area and sea wall block any natural positive drainage away from the interior, thus it is reasonable to conclude that the interior units are below ground level on all sides.

Based upon a review of the available data, it is my opinion that the lower floor of the Surfsand Resort Beachfront Building is below ground level on all sides and thus does [in] fact meet the definition of a basement as denied in the Standard Flood Insurance Policy. This floor should be considered a basement for policy purposes, including Units 1101-1112, the hallway, and the storage area.

Decl. of James Guse, Ex. 7 at 6-7.

On March 23, 2017, Nationwide advised Plaintiff that it had reviewed Gardner's Report and that it was "upholding our denial of non-covered items in a basement as indicated in our letter of June 3, 2016." Guse Decl., Ex. 8 at 1.

On June 2, 2017, Plaintiff filed an action in this Court against Nationwide and Harleysville asserting claims for breach of insurance contract and negligence *per se*. Plaintiff seeks damages in the amount of \$396,234.92, "which represents the amount of the covered loss denied by Defendants"; seeks attorneys' fees; and requests a jury trial.

On August 21, 2017, Defendants filed a Motion to Dismiss Count II of Plaintiff's Complaint and a Motion to Strike Jury Demand in which they sought an order dismissing Plaintiff's claim for negligence *per se*, request for attorneys' fees, and demand for a jury trial.

On October 16, 2017, the Court issued an Opinion and Order in which it granted Defendants' Motion to Dismiss and Motion to Strike Jury Demand.

On March 15, 2018, Plaintiff filed a Motion for Summary Judgment. On April 5, 2018, Defendants filed a Cross-Motion for Summary Judgment. The Court took the Motions under advisement on May 3, 2018.

#### **STANDARDS**

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Washington Mut. Ins. v. United States*, 636 F.3d 1207, 1216 (9<sup>th</sup> Cir. 2011). See also Fed. R.

Civ. P. 56(a). The moving party must show the absence of a genuine dispute as to a material fact. *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9<sup>th</sup> Cir. 2012). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and point to "specific facts demonstrating the existence of genuine issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9<sup>th</sup> Cir. 2010) "This burden is not a light one. . . . The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." *Id.* (citation omitted).

A dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9<sup>th</sup> Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9<sup>th</sup> Cir. 2010). "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9<sup>th</sup> Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9<sup>th</sup> Cir. 1982)).

"A non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary

judgment." *F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9<sup>th</sup> Cir. 2009)(citation omitted). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9<sup>th</sup> Cir. 2009) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9<sup>th</sup> Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9<sup>th</sup> Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

### **DISCUSSION**

Plaintiff moves for summary judgment on the ground that there is not any genuine dispute of material fact that the lowest level of the Surfsand Resort is not a basement within the meaning of the SFIP. According to Plaintiff, it is, therefore, entitled to coverage for damages in the amount of \$396,234.92, "which represents the amount of the covered loss denied by Defendants."

Defendants, on the other hand, move for summary judgment on the ground that it paid Plaintiff \$98,765.08, which is the amount of the only Proof of Loss that Plaintiff submitted to Defendants. Moreover, Plaintiff has never submitted a supplemental Proof of

Loss for the \$396,234.92 that it now seeks in this action, and, therefore, Plaintiff has not satisfied a condition precedent of the SFIP. Defendants also contend the lowest level of the Surfsand Resort is a basement within the meaning of the policy, and, therefore, Plaintiff's requested damages are not covered under the policy.

#### **I. National Flood Insurance Program**

Congress enacted the NFIA in 1968 in response to the fact that flood disasters were creating personal hardships and economic distress that was "increasing [the] burden on the Nation's resources" and the exposure to flood losses was "growing." 42 U.S.C. § 4001(a). The NFIA created the National Flood Insurance Program (NFIP) under the administration of FEMA to "mak[e] flood insurance coverage available on reasonable terms and conditions." *Id.* See also 42 U.S.C. § 4011. Flood insurance under the NFIP is sold to qualified applicants either directly by FEMA or by private insurance companies known as "write-your-own" (WYO) Companies. 44 C.F.R. § 62.23. A WYO Company enters into a standardized agreement with FEMA that authorizes the WYO Company to issue flood insurance in its own name and assigns the WYO Company the responsibility for "the adjustment, settlement, payment and defense of all claims arising from policies of flood insurance it issues under the Program." 44 C.F.R. § 62.23(d). Nevertheless, the ultimate responsibility

for paying all claims remains with FEMA. See 42 U.S.C. § 4017(a).

The NFIA regulations specify the required terms and conditions of policies written under the NFIP. For example, the SFIP must advise the insured that FEMA is providing insurance "under the terms of the National Flood Insurance Act of 1968 and its Amendments, and Title 44 of the Code of Federal Regulations." 44 C.F.R. pt. 61, app. A(1), art. I. The SFIP also must identify the scope of coverage, the exclusions, the deductions, and the general conditions applicable to coverage, adjustment, and payment. The SFIP must also include the following provision:

This policy and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. § 4001, et seq.), and Federal common law.<sup>2</sup>

44 C.F.R. pt. 61, app. A(1), art. IX. WYO Companies cannot waive or vary the terms or conditions of the SFIP without the express, written consent of the Federal Insurance Administrator. 44 C.F.R. § 61.13(d).

In addition, the SFIP also must include the following conditions and limitations for filing actions for claims under SFIPs and for disputes arising out of the handling of any claim under an SFIP:

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<sup>2</sup> The SFIP at issue included all of the required language identified above.

You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. . . . This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under the policy.

44 C.F.R. pt. 61, app. A(1), art. VII(R). See also 42 U.S.C. § 4072; 44 C.F.R. § 62.22.

"In short, [SFIP], claims under [SFIPs], and disputes relating to the handling of claims under [SFIPs] are highly regulated." *Woodson v. Allstate Ins. Co.*, 855 F.3d 628, 622-23 (4<sup>th</sup> Cir. 2017). See also *Suopys v. Omaha Prop. & Cas.*, 404 F.3d 805, 809 (3d Cir. 2005) ("Because any claim paid by a WYO Company is a direct charge to the United States Treasury, strict adherence to the conditions precedent to payment is required.") (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947); *Flick v. Liberty Mut.*, 205 F.3d 386 (9<sup>th</sup> Cir. 2000) (strict compliance is applied to policies written by WYO Companies under the NFIP because flood-loss claims are paid from United States Treasury)).

## **II. Plaintiff failed to satisfy a condition precedent of the SFIP.**

As noted, Defendants move for summary judgment on the ground that Plaintiff has never submitted a supplemental Proof of Loss for the \$396,234.92 that it now seeks in this action. According to Defendants, therefore, Plaintiff has not satisfied a condition precedent of the SFIP, and, accordingly, Plaintiff may not bring

a claim for those damages.

It is undisputed that Plaintiff submitted to Defendants a Proof of Loss on May 4, 2016, asserting a claim for \$98,765.08. As noted, however, the record does not reflect Plaintiff submitted any supplemental or additional Proof of Loss to Defendants for the \$396,234.92 that it now seeks as damages.

The SFIP provides in relevant part:

In case of a flood loss to insured property, you must:

\* \* \*

3. Prepare an inventory of damage property showing the quantity, description, actual cash value, and amount of loss. Attach all bills, receipts, and related documents.
4. Within 60 days after the loss, send us a proof of loss, which is your statement of the amount you are claiming under the policy signed and sworn to by you, and which furnishes us with the following information:

\* \* \*

- f. Specifications of damaged buildings and detailed repair estimates; [and]

\* \* \*

- i. The inventory of damaged property described in J.3 above.

Hickman Decl., Ex. 1 at Art VII(J)(4)(emphasis added). See also 44 C.F.R. § 61, App. A(2), Art. VII(J)(4)(same). The SFIP provides if the insurer rejects the Proof of Loss "in whole or in part," the insured "may":

- a. Accept such denial of your claim;
- b. Exercise your rights under this policy; or
- c. File an amended proof of loss, as long as it is filed within 60 days of the date of the loss.

Hickman Decl., Ex. 1 at Art VII(M)(2).

The Ninth Circuit and other courts have held a timely signed and sworn Proof of Loss is a condition precedent to an insured obtaining benefits under an SFIP policy. See *Pecarovich v. Allstate Ins. Co.*, 309 F.3d 652, 659-60 (9<sup>th</sup> Cir. 2002) (concluding the plaintiff failed to satisfy the condition precedent of the SFIP when he did not file a proof of loss). See also *Dickson v. Am. Bankers Ins. Co. of Fl.*, 739 F.3d 397, 399 (8<sup>th</sup> Cir. 2014)("[T]he proof of loss requirement is a regulatory limit on the disbursement of funds through a federal insurance program; as such 'it is to be strictly construed [for it] serves as a condition precedent to recovery under the SFIP.'" (quoting *Gunter v. Farmers Ins. Co.*, 736 F.3d 768, 773 (8<sup>th</sup> Cir. 2013))); *DeCosta v. Allstate Ins. Co.*, 730 F.3d 76, 84 (1<sup>st</sup> Cir. 2013) ("Given that it is the government's liability at stake in any suit against a WYO insurer, compliance with the proof-of-loss provision serves as a "condition[ ] precedent to a waiver by the federal government of its sovereign immunity.").

Although the Ninth Circuit has not addressed the issue, other courts have held an insured must submit an additional or

supplemental proof of loss as a condition precedent "to recover an additional amount on a preexisting claim under a[n] SFIP." *Cummings v. Fidelity Nat. Indem. Ins. Co.*, 636 F. App'x 221, 223-24 (5<sup>th</sup> Cir. 2016). See also *Dickson*, 739 F.3d at 399 ("a signed and sworn proof of loss claims only the amounts listed in those forms, and the insured must timely file an additional proof of loss to claim any additional amount of money."). As the Fifth Circuit explained in *Cummings*,

a policy of "insurance issued pursuant to a federal program must be strictly construed and enforced.'" *Monistere*, 559 F.3d at 394 (quoting *Gowland*, 143 F.3d at 954). "Because insurance companies act as 'fiscal agents' of the government under the National Flood Insurance Program, all policy awards deplete federally allocated funds." *Id.* (quoting *In re Estate of Lee*, 812 F.2d 253, 256 (5<sup>th</sup> Cir. 1987)). Accordingly, "not even the temptations of a hard case' will provide a basis for ordering recovery contrary to the terms of a regulation, for to do so would disregard 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" *Id.* (quoting *Forman v. Fed. Emergency Mgmt. Agency*, 138 F.3d 543, 545 (5<sup>th</sup> Cir. 1998)). See generally *Richmond Printing LLC v. Dir. Fed. Emergency Mgmt. Agency*, 72 F. App'x 92, 97 (5<sup>th</sup> Cir. 2003) (citing *Kerr v. FEMA*, 113 F.3d 884 (8<sup>th</sup> Cir. 1997)) (finding that completion of the proof of loss is the insured's own responsibility and "any reliance on statements made by the adjuster that contradicted the terms of the SFIP was unreasonable as a matter of law; the insured had a duty to read the policy and acted unreasonably in relying on adjusters provided only as a 'courtesy'"); see also *Gowland*, 143 F.3d at 955 (quoting *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947)) ("Requiring [insured parties] to turn square corners when dealing with the Treasury 'does not reflect a callous outlook. It merely expresses the duty of all courts to observe the

conditions defined by Congress for charging the public treasury.'").

636 F. App'x at 224.

Plaintiff does not dispute it failed to file a supplemental or additional proof of loss seeking the additional damages of \$396,234.92 that it now seeks. Plaintiff, however, asserts it provided all "of the documentation regarding damaged areas . . . and its contents" to claims adjuster Jacob Valencia who "specifically excluded items that he considered to be in a basement." Decl. of Ted Stark at ¶ 4. Plaintiff points out that Valencia advised Plaintiff in February and April 2016 (before Plaintiff filed the May 2016 proof of loss) that "a Proof of Loss was only to act as a 'minimum' of items that are flood damaged. He further indicated that any 'covered, omitted or reasonable cost difference' could be addressed with a Claim for Additional Payment (CAP)." *Id.* Plaintiff argues Valencia was acting as Defendants' agent, and, therefore, Valencia's refusal to submit all of the damages either waived the requirement or absolved Plaintiff of the responsibility to submit a supplemental proof of loss as to the damages that Plaintiff now seeks. Arguments similar to those made by Plaintiff, however, have been rejected by various courts.

For example, the Eighth Circuit explained in *Dickson*:

The SFIP defines the proof of loss as the insureds' signed and sworn "statement of the amount [they] are claiming under the policy."

44 C.F.R. pt. 61 app. A(1), art. VII(J)(4). Independent insurance adjusters may assist the insureds by providing or preparing this proof of loss form, but the SFIP is clear that even with such assistance the insureds must use their own judgment concerning the amount of loss they claim.

\* \* \*

Among the significant SFIP provisions concerning the proof of loss requirement is a rule that "[i]n completing the proof of loss, [the insureds] must use [their] own judgment concerning the amount of loss and justify that amount." 44 C.F.R. pt. 61 app. A(1), art. VII(J)(5). While insurance adjusters may assist with preparing the proof of loss form, they do so as "a matter of courtesy only" and insureds are ultimately responsible for ensuring their claim is timely filed. *Id.*, art. VII(J)(7). Thus as a matter of law, the [plaintiffs] were the only parties responsible for ensuring compliance with the proof of loss requirement, including the determination of the "amount of loss."

\* \* \*

[T]he SFIP requires insureds to use their own judgment to determine the amount of loss they claim. It was therefore solely the [plaintiffs'] own responsibility to file a timely proof of loss for any amount they believed was covered by the policy.

*Dickson*, 739 F.3d at 399-400. Similarly, in *DaCosta* the court noted

FEMA must provide express written consent . . . to waive any of the requirements outlined in [an] SFIP. The SFIP's waiver provision states, "[t]his policy cannot be changed nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator. No action we take under the terms of this policy constitutes a waiver of any of our rights." 44 C.F.R. pt. 61, App. a(1), Art. VII(D).

The SFIP's stringent waiver provision reflects the fact that private insurers are "fiscal agents of the United States," 42 U.S.C. § 4071(a)(1), as opposed to general agents. See *McGair*, 693 F.3d at 96. Thus, consistent with their duty to strictly enforce the SFIP, private insurance companies can "[vary] the terms of a policy only with FEMA's express written consent." *Jacobson*, 672 F.3d at 175. . . . [T]he SFIP "explicitly preclude[s] oral waiver or waiver by conduct.

730 F.3d at 87.

In *Dickson* the court also rejected the plaintiffs' assertion that their claims adjuster engaged in misconduct when it inaccurately advised them about the amount of their proof of loss:

The adjuster explained . . . the [plaintiffs] could "always submit a supplemental claim for additional damages." The [plaintiffs] were thus alerted to the potential need for filing a supplemental claim. . . . Moreover, the SFIP provides clear directives that the [plaintiffs] needed to file a proof of loss for their claim . . . . The responsibility to ensure compliance with the prerequisites for filing suit lay with the [plaintiffs].

*Id.* at 401.

This Court adopts the reasoning of *Cummings*, *DaCosta*, and *Dickson* and concludes Plaintiff's submission of an additional or supplemental proof of loss is a condition precedent to recover an additional amount on a preexisting claim under an SFIP. The Court also concludes Valencia's alleged refusal to submit a claim for damages related to the part of Plaintiff's property that he believed to be a basement is insufficient to waive the

supplemental proof-of-loss requirement because Plaintiff had an independent duty to determine the amount of its own loss; FEMA did not waive the SFIP requirement to submit a supplemental proof of loss; and Valencia, in fact, informed Plaintiff that "any covered, omitted or reasonable cost difference could be addressed with a Claim for Additional Payment." Thus, on this record the Court concludes Plaintiff failed to comply with the condition precedent for seeking additional damages within the time required by the SFIP and FEMA. The Court, therefore, grants that portion of Defendants' Motion for Summary Judgment based on Plaintiff's failure to file a supplemental proof of loss.

In addition, because the Court has concluded Plaintiff failed to satisfy a condition precedent before bringing this action, the Court does not have the authority to decide whether the lower level of Plaintiff's property is a basement within the meaning of the SFIP, and, therefore, the Court does not express any opinion on that issue. Accordingly, the Court denies Plaintiff's Motion for Summary Judgment.

#### **CONCLUSION**

For these reasons, the Court **DENIES** Plaintiff's Motion (#32) for Summary Judgment, **GRANTS** Defendants' Cross-Motion (#36) for

Summary Judgment, and **DISMISSES** this matter.

IT IS SO ORDERED.

DATED this 28<sup>th</sup> day of June, 2018.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States Senior District Judge